

**BEFORE THE**  
**STATE OF WISCONSIN**  
**DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Redetermination of the     )  
Fuel Tax Assessment of Roehl Transport,     )  
Inc., Account No. WI-391145228-99     )

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Case No.: 94-H-886

**FINAL DECISION**

In July, 1992, the Wisconsin Department of Transportation (Department or respondent) audited the tax filing of Roehl Transport, Inc. (Roehl or petitioner) for the period from April 1, 1988 through June 30, 1992. As a result of the audit, Roehl was assessed additional fuel tax along with interest and penalties. By letter dated October 6, 1992, Roehl timely protested the assessment and requested a hearing. In response to the request for a hearing, the parties met on March 2, 1993. By letter dated July 16, 1993, the respondent informed Roehl that it had ruled against the petition of Roehl and that the audited tax liability remained unchanged. The letter further instructed Roehl to pay the assessment or commence legal proceedings within thirty days.

On August 16, 1993, Roehl timely filed a petition for judicial review in the circuit court for Wood County. At a hearing on April 28, 1994, the Wood County judge determined that the respondent did not conduct the March 2, 1993 hearing in compliance with the requirements of Chapter 227, Stats. By order dated May 26, 1994, the court remanded the petition of Roehl to the respondent "for proceedings in accordance with Chapter 227, Stats." On November 7, 1994, Roehl requested respondent conduct the hearing ordered by the Wood County court. In response to this request, the Department requested the Division of Hearings and Appeals assign a hearing examiner and schedule a hearing.

The parties have agreed that the matter may be decided without a hearing. The parties filed a stipulation of facts and ten exhibits (marked "a" through "j") on March 20, 1995. The petitioner filed its initial brief on March 14, 1995. The respondent filed a response brief on April 11, 1995. The petitioner filed a reply brief on May 5, 1995. Additionally, the respondent filed supplementary material on July 31, 1995 and the petitioner filed a response on August 7, 1995.

In accordance with §§227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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Mark J. Kaiser, administrative law judge, issued a proposed decision on October 4, 1995. The Department filed comments on the proposed decision on October 18, 1995, and the petitioner filed comments objecting to the proposed decision on October 19, 1995.

In its objections to the proposed decision, the petitioner notes that in a letter dated January 23, 1995, the administrative law judge confirmed an agreement of the parties that if the finding was that the petitioner is not required to report non-propulsion fuel an evidentiary hearing would then be scheduled to determine whether the Department properly calculated the assessment for non-propulsion fuel in the audit. The finding is that the petitioner is required to report all fuel. Fuel consumed during off-highway operation, either in propulsion or non-propulsion activity is tax-exempt and the petitioner may seek either a refund or credit for tax paid on those gallons of fuel.

The January 23, 1995, letter also states that "[i]f the finding is that the [p]etitioner is required to report fuel consumed for non-propulsion purposes, this determination will be

dispositive of the issues in this case. [The] decision [of the administrative law judge] will be issued in the form of a proposed decision ...." Based on the finding made it was appropriate for the administrative law judge to issue a proposed decision.

In its objections, the petitioner also contends that the administrative law judge failed to give consideration to stipulation no. 22 of the parties' stipulation of facts. Stipulation no. 22 provides that "[t]he proper measure of fuel tax, if necessary, will be determined later." This stipulation immediately follows a stipulation which provides that "[i]n order to expedite this matter, [r]espondent will abate the assessment of additional taxes for unreported miles which were accrued in jurisdictions which are not members of IFTA." The apparent intent of these two stipulations is that the parties will agree on the amount of the assessment which is for fuel consumed in non-IFTA jurisdictions. That amount will be subtracted from the assessment.

The administrative law judge did acknowledge this agreement in the decision and gave it consideration in the order. The order affirms the audit with the exception of those portions which assess the petitioner for fuel use taxes in non-IFTA jurisdictions. If the parties are unable to agree on the proper measure of fuel tax, they may return to the Division of Hearings and appeals for further proceedings.

With the exception of minor editorial changes and correcting typographical errors, the proposed decision is adopted as the final decision in this matter.

### APPLICABLE LAW

#### WISCONSIN STATUTES

Section 78.40(1), Stats. (1991)<sup>1</sup> provides in relevant part:

Imposition of tax and by whom paid. An excise tax at the rate determined under §78.44, of special fuel. The tax, with respect to all special fuel delivered by a special fuel dealer into supply tanks of motor vehicles in this state, attaches at the time of delivery and shall be collected by the dealer from the special fuel user and shall be paid to the department [of revenue]. The tax, with respect to special fuels acquired by any special fuels user other than by delivery by a special fuel dealer into a fuel supply tank of a motor vehicle, attaches at the time of the use of the fuel and shall be paid to the department by the user.

Section 78.75(1m)(a)1, Stats., provides in relevant part:

... a person who uses...special fuel upon which has been paid the tax required under this chapter, ...for any purpose other than operating a motor vehicle upon the public

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<sup>1</sup>The applicable statutes were revised in 1993. The time period at issue is from April 1, 1988 through June 30, 1992. For purposes of this decision the only relevant change is the use of the term "alternate fuel" rather than "special fuel." To avoid confusion the statutes as in effect in 1991 will be cited.

highways, shall be reimbursed and paid the amount of tax paid upon making and filing a claim with the department if the claim is for the tax on 100 gallons or more.

Section 341.45, Stats., provides in relevant part:

Importation in vehicle tanks regulated; taxes. (1)

In this section:

(a) "Motor fuel" has the meaning given in §78.04.

(am) "Qualified motor vehicle" means a qualified motor vehicle as defined in the international fuel tax agreement or any of the following motor vehicles used, designed or maintained for the transportation of persons or property:

1. A motor vehicle having 2 axles and a gross vehicle weight exceeding 26,000 pounds.
2. A motor vehicle having 2 axles and registered at a gross vehicle weight exceeding 26,000 pounds.
3. A motor vehicle having 3 or more axles, regardless of weight.
4. A motor vehicle used in combination with another vehicle when the gross vehicles weight of the combination exceeds 26,000 pounds.

(b) "Special Fuel" has the meaning given in §78.43.

(1g)(a) Every person who purchases or obtains motor fuel or special fuel outside of this state and operates any qualified motor vehicle into this state upon a highway and transports motor fuel or special fuel in an attached or unattached fuel supply tank for the sole purpose of operating the qualified motor vehicle shall pay the Wisconsin motor fuel or special fuel tax on the gallons consumed by the qualified motor vehicle while operated on the highways of this state. The person shall pay the tax by purchasing motor fuel or special fuel within this state in an amount that is equivalent to the gallonage consumed while operating the qualified motor vehicle on the highways of this state, or by remitting the tax directly to the department or to another jurisdiction that is a party to the international fuel tax agreement.

(b) The department may require any person required to pay under par. (a) to report on forms prescribed by it, to display evidence of compliance with par. (a) and to pay taxes in the manner specified by the department. The department shall require any person convicted of evading the tax due under par. (a) to report on forms and in the manner prescribed by the department.

(2) Every person regularly or habitually operating qualified motor vehicles upon the highways of any other state and using in those qualified motor vehicles motor fuel or special fuel purchased or obtained in this state shall be allowed a credit or refund equal to the tax on the motor fuel or special fuel actually paid to the state in which it is used, but not to exceed the tax imposed on motor fuel or special fuel by this state.

(3) The department may enter into reciprocal agreements with the appropriate officials of any other state under which it may waive all or any part of the requirements imposed this section upon those who use motor fuel or special fuel upon which the tax has been paid to another state if the officials of the other state grant equivalent privileges with respect to motor fuel or special fuel used in that state but upon which the tax has been paid to Wisconsin.

(4) The secretary may ratify and effectuate the international fuel tax agreement or other fuel tax agreement.

(5) The department shall promulgate rules under ch. 227 necessary to administer this section. The rules may include provisions relating to the payment of interest on late payments of motor fuel and special fuel taxes and fees for the late payment or underpayment of motor fuel and special fuel taxes.

Section 340.01(22), Stats., provides:

"Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01 (1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

Section 346.63(3)(b), Stats., provides:

"Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

#### ADMINISTRATIVE REGULATIONS

Section Trans 152.01, Wis. Adm. Code, provides in relevant part:

INTRODUCTION. (1) PURPOSE. This chapter creates rules which will be used in the collection of motor fuel and special fuel use taxes for fuel that is purchased in Wisconsin and other jurisdictions and consumed by qualified motor vehicles operating on the highways of this state.

(2) SCOPE. This chapter applies to every person who operates any qualified motor vehicle as described in this chapter.

(3) INTERNATIONAL FUEL TAX AGREEMENT. Under the authority of s. 341.45(4), Stats., Wisconsin became a member of the international fuel tax agreement. The IFTA is an agreement among states and provinces to simplify the reporting of fuel use taxes by interstate motor carriers. The IFTA reduces the paperwork and compliance burdens for fuel tax reporting. The provisions of the international fuel tax agreement in effect on September 1, 1993 and those subsequently ratified by this state are incorporated by reference. If any provisions of this chapter are inconsistent with the provisions in the international fuel tax agreement, the provisions of the international fuel tax agreement apply for applicants licensed under the international fuel tax agreement and the provision of this chapter apply to persons not licensed under the international fuel tax agreement.

Section Trans 152.02, Wis. Adm. Code, provides in relevant part:

DEFINITIONS. The words and phrases defined in ss. 78.04, 78.43, 340.01 and 341.45(1), Stats., have the same meaning in this chapter unless a different definition is specifically provided. In this chapter:

(4) "Base jurisdiction" means the international fuel tax agreement member jurisdiction:

- (a) Where qualified motor vehicles are based for vehicle registration purposes;
- (b) Where the operational control and operational records of the licensee's qualified motor vehicles are maintained or can be made available; and
- (c) Where some mileage is accrued by qualified motor vehicles within the fleet.

(6) "Distance" means miles or kilometers.

(7) "Fleet" means one or more qualified motor vehicles grouped together for fuel tax reporting purposes.

(8) "Fuel supply tank" means the container for holding, transporting or storing fuel.

(9) "Highways of this state" means "highways" as defined in s. 340.01(22), Stats., within the boundaries of this state as defined in art. II, s. 1, Wisconsin Constitution.

(10) "International fuel tax agreement" or "IFTA" means a contract between certain member jurisdictions which allows for the collection of fuel taxes owed to all member jurisdictions by the member jurisdiction in which a person is based.

(11) "Jurisdiction" means a state of the United States, the District of Columbia or a province or territory of Canada or Mexico.

(16) "Operate" has the meaning specified in s. 346.63(3)(b), Stats.

(22) "Reporting period" means a period of time consistent with the calendar quarterly period of January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31.

(25) "Total miles" means all miles traveled during the reporting period by every qualified vehicles in the licensee's fleet regardless of whether the miles are considered taxable or nontaxable.

Section Trans 152.03, Wis. Adm. Code,

IMPOSITION OF TAX. (1) GENERAL. Any person who purchases or obtains motor fuel or special fuel outside this state and operates any qualified motor vehicle in this state upon a highway and transports motor fuel or special fuel in an attached or unattached fuel supply tank for the sole purpose of operating the qualified motor vehicle shall pay the Wisconsin fuel tax on the gallons consumed by the qualified motor vehicle while operated on the highways of this state. The person shall pay the tax in the following manner:

- (a) By purchasing tax paid motor fuel or special fuel within this state in an amount equivalent to the gallonage consumed while operating the qualified motor vehicles on the highways of this state, or

(b) By remitting the tax directly to the department as provided by this chapter,  
or

(c) By remitting the tax to licensee's base jurisdiction if that jurisdiction is party to the international fuel tax agreement. This state has adopted the international fuel tax agreement.

(2) TAX EXEMPT MILES. This state does not impose a use tax on the fuel consumed for either of the following:

- a. When the motor vehicle is being operated under a fuel trip permit.
- b. When the fuel is consumed while operating on private roads or driveways located in this state.

(3) COMPLIANCE. Any person operating a qualified motor vehicle in Wisconsin is required to comply with this chapter. Qualified motor vehicles which are not in compliance with the requirements of this section shall be subject to the penalties provided by s. 341.45, Stats., except those licensed under IFTA shall be subject to the penalties provided for under that agreement.

Section Trans 152.06, Wis. Adm. Code, provides in relevant part:

**LICENSEE RECORDS REQUIREMENT.** (1) FUEL. Each licensee shall maintain a complete record of all fuel purchased, received and used in the conduct of its business. The fuel records shall contain the following:

- (a) The date of each receipt of fuel.
- (b) The name and address of the person from whom purchased or received.
- (c) The number of units received.
- (d) The type of fuel.
- (e) The vehicle or equipment into which the fuel was placed.
- (f) Fuel summaries for each vehicle for each jurisdiction in which the vehicle was operated.
- (g) Summaries of the total fuel obtained under each category specified in pars. (c) to (f) for each calendar quarter.

...

(4) BURDEN OF PROOF. All motor fuel or special fuel acquired which is normally subject to use tax is taxable unless proof to the contrary is provided by the licensee.

Section Trans 152.08, Wis. Adm. Code, provides in relevant part:

**AUDITS AND ASSESSMENTS** (1) AUDIT. The department may conduct such audits that it deems necessary to determine the adequacy of the taxes paid under this chapter. All records described in this chapter shall be made available to the department at its request.

...

(3) ASSESSMENTS. (a) If any person fails to make records available upon proper request or if any person fails to maintain records from which the true liability may be determined, the department may assess a tax based upon the department's estimation of the tax liability. The department may make an estimate from information previously furnished by the person, if available, may make an estimate based upon 4 miles per gallon, and any other pertinent information that may be available to the department. The assessment made by the department pursuant to this procedure shall be presumed to be correct, and in any case where the validity of the assessment is drawn in question, the burden shall be on the person to establish by a fair preponderance of evidence that the assessment is erroneous or excessive.

...

## RELEVANT AGREEMENTS

### WISCONSIN-MINNESOTA-IOWA FUEL TAX AGREEMENT

In an attempt to simplify requirements for their carriers in the area of fuel reporting and pursuant to, and in conformity with the laws of their respective states, the lawfully authorized officials of each state do mutually agree to participate in this agreement, relating to the obtaining of fuel tax permits and reporting, for each other's carriers that file under this agreement.

1. Wisconsin carriers, who volunteer for this plan, will file their fuel quarterly reports for the participating jurisdictions with their base state of Wisconsin. Similarly, Iowa and Minnesota carriers will file their fuel quarterly reports for the participating jurisdictions with their base state.
2. The reports will be completed to show the national mileage driven and fuel consumed (in gallons) and mileage driven and fuel consumed in Wisconsin, Minnesota and Iowa.
3. The base state will collect net taxes owed or refund net overpayment to the carrier for all three jurisdictions.

### APPLICATION FOR PILOT BASE STATE FUEL TAX AGREEMENT

I authorize the state of Wisconsin to withhold refund of tax over-payments if taxes are due any member jurisdiction. I agree to comply with the reporting, payment, recordkeeping and credential display requirements which are required by my participation in this Agreement.

## ...INSTRUCTIONS TO COMPLETE WISCONSIN PILOT FUEL TAX QUARTERLY REPORT

Column 5      List taxable gallons for each member jurisdiction. To obtain this figure use the Fleet computation. You compute the fleet average by: a. list total miles traveled in all jurisdictions, b. list total fuel consumed in all jurisdictions, then c. divide total miles by total fuel to obtain fleet average miles per gallon. **DIVIDE THE JURISDICTION TOTAL MILES BY THE FLEET AVERAGE TO OBTAIN THE TAXABLE GALLONS FOR EACH MEMBER JURISDICTION.**

## INTERNATIONAL FUEL TAX AGREEMENT ARTICLES OF AGREEMENT

### II. DEFINITIONS

- ...
- I.      "Motor Fuels" means all fuels used for the generation of power for the propulsion of qualified motor vehicles.
- ...

### III. TAXATION OF MOTOR FUELS

- A.      For purposes of this Agreement, the taxable event is the consumption of motor fuels used in the propulsion of qualified motor vehicles, except fuel consumed that is exempt from taxation by a jurisdiction.
- ...
- C.      All motor fuel acquired that is normally subject to the consumption tax is taxable unless proof to the contrary is provided by the licensee.

### VIII. RECORDS REQUIREMENTS

- A.      Every licensee shall maintain records to substantiate information reported on the quarterly tax report. Record requirements shall be specified in the IFTA Procedures Manual.

### IX. REPORTING

- ...
- C.      The report shall cover the previous calendar quarter and shall include the following information:
- ...

2. Total number of gallons or liters of motor fuel used by the licensee in the operation of qualified motor vehicles;

#### X. BASE JURISDICTION ACCOUNTING

...

- A. The base jurisdiction shall maintain a record of distance traveled, gallons or liters of fuel used, taxes due, tax credits, and payments for each licensee for each member jurisdiction. The record shall include the results of audits performed by the base jurisdiction and other jurisdictions.

#### XI. AUDITING

...

- D. The base jurisdiction shall audit its licensees on behalf of all member jurisdictions. This shall not preclude another jurisdiction from also auditing a licensee. In that event, that jurisdiction shall pay all its audit expenses.

### INTERNATIONAL FUEL TAX AGREEMENT PROCEDURES MANUAL

#### IV. TAX REPORTING

##### A. Tax Reporting

1. Each jurisdiction shall use a standard tax report that shall contain, but not be limited to, the following elements:

...

- f. A space for the total fuel consumed in all jurisdictions during the reporting period.

...

8. For reporting tax-exempt miles or kilometers, the licensee is required to obtain the definition of operations that qualify for tax exemption status from the base jurisdictions of the Agreement. These definitions will be incorporated into the Audit Procedures Manual that is prepared under the authority of the Agreement.
9. The licensee must report all fuel placed in the supply tank of the qualified motor vehicle as taxable on the IFTA tax report. Jurisdictions may define tax-exempt fuel. The licensee must submit a claim for

refund for tax paid on tax-exempt fuel directly to the respective jurisdiction.<sup>2</sup>

### FINDINGS OF FACT

The Administrator Finds:

Pursuant to the stipulation of the parties the following facts are found:

1. Roehl is a Wisconsin corporation, with its headquarters in Marshfield, Wisconsin, from where it engages in the interstate trucking of goods. Respondent is the Wisconsin Department of Transportation.
2. Roehl is a for-hire motor carrier. It provides transportation services of various types of dry freight to a variety of customers throughout the continental United States and Eastern Canada. Roehl has in excess of 600 "qualified motor vehicles" (as such phrase is defined in International Fuel Tax Agreement ("IFTA")) in its fleet. Roehl vehicles operate in all 48 states of the continental United States and in eight provinces of Canada.
3. In 1988, Roehl observed that its vehicles consumed a significant amount of fuel while the vehicles' engines were running, but the vehicles were stationary ("idling" or "idle time"). Roehl further observed that this vehicle idle time could be broken up into two distinct categories: (1) idle time occurring on the public highway for purposes such as stopping at traffic signals and railroad crossing; and (b) idle time occurring off the public highways for the purpose of maintaining a comfortable cabin temperature, i.e., while the driver slept, while product was being loaded on or off the vehicle, or while the driver left the vehicle for short periods for meals or coffee, and for the purpose of maintaining engine and stored fuel temperature during periods of extensive cold weather.
4. In the fall of 1988, Roehl started purchasing Rockwell Trip Masters (the "Trip Master") and started to install one in each of its vehicles. All of Roehl's vehicles were equipped with the Trip Masters by September 1, 1989. Roehl's primary reason for installing the Trip Master in each of its vehicles was to assist it in the effective management of its operations. Roehl reasoned that by monitoring the idle time, it could find ways of reducing this idle time, and thereby increase the efficiency of its operations.

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<sup>2</sup>The petitioner notes in its reply brief that Paragraph IV A 9 of the IFTA procedures manual did not become effective until January 1, 1993. A note following this provision indicates that the new section 9 "provides clarification as to whom a refund for tax-exempt fuel should be filed." Based on this statement it appears the drafters of section 9 intended to provide clarification, not change any existing provisions of the IFTA Procedures Manual. Additionally, the parties stipulated that exhibit f is the International Fuel Tax Agreement, Procedure Manual, and Audit Manual in effect for the applicable tax periods. For purposes of this decision, it is assumed that the provisions of section 9 are consistent with the IFTA Procedure Manual in effect during the relevant time period.

5. The Trip Master is an on-board computer which records actual vehicle operations. The Trip Master records the daily activity of a vehicle and stores this record in a daily file.
6. One function of the Trip Master is to record the amount of idle time incurred by each vehicle. The Trip Master accomplishes this function by recording engine revolutions and speedometer movement. Roehl has set the Trip Master to begin recording idle time after the vehicle's engine has been running and the speedometer shows no truck movement for eight (8) consecutive minutes. The Trip Master continues to record this time as idle time until it receives a signal from the speedometer that wheel movement has begun. Prior to the installation of a Trip Master on a vehicle, idle time was accounted for manually. Drivers filled out by hand a report whenever the vehicle idled for extended periods of time.
7. As a management tool, Roehl monitors the amount of idle time in excess of eight (8) minutes incurred by each of its drivers. Drivers who meet Roehl's prescribed limits of idle in excess of eight minutes and who meet certain other criteria, receive additional compensation, up to \$.03 per mile, under Roehl's bonus plan. One of the purposes of the bonus plan is to encourage drivers to limit the amount of idle time. Since the implementation of the bonus plan, idle time in excess of eight (8) minutes has steadily decreased.
8. In order to accurately and properly record the amount of each vehicle's idle time in excess of eight minutes, a Roehl garage employee separately records, each time the vehicle returns from a delivery, the amount of idle time in excess of eight (8) minutes recorded by the vehicle's Trip Master.
9. Roehl conducted a series of fuel consumption tests of its vehicle engines. As a result of these tests, Roehl concluded that the vehicle engines, while idling, consumed an average .859 gallons of fuel per hour. To determine fuel consumed by its tractors while idling in excess of eight minutes, Roehl multiplied the amount of idle time in excess of eight minutes in hours (measured in hundredths of hours) by .859 gallons of fuel-per hour.
10. Relating to the assessment, collection, audit and enforcement of fuel taxes imposed on interstate motor vehicles, effective July 1, 1989, Wisconsin entered into an agreement with several other states entitled the International Fuel Tax Agreement ("IFTA"). Prior to July 1, 1989, Wisconsin, Minnesota and Iowa had entered into a fuel tax agreement commonly known as the "Interstate Pilot Fuel Tax Project."
11. During 1988 and the first half of 1989, Roehl was a participant in the Interstate Pilot Fuel Tax Project. Commencing in July, 1989, Roehl elected to satisfy its fuel use tax obligations by applying for an IFTA license from respondent and to file quarterly reports along with the payment of taxes due to the respondent and all other IFTA member jurisdictions.

12. Pursuant to IFTA, respondent collects fuel taxes from motor carriers based in Wisconsin on Wisconsin's behalf and on behalf of other member jurisdictions. After collection, respondent distributes to Wisconsin and the other IFTA member states fuel taxes paid by interstate motor carriers based in Wisconsin.
13. Commencing with the third quarter 1988 fuel tax reports, in calculating the amount due for fuel tax purposes for each tax period Roehl treated fuel consumed by its tractors while idling in excess of eight (8) minutes as non-taxable fuel. The number of total gallons consumed while idling in excess of eight (8) minutes was subtracted from the total number of gallons purchased. The remainder was the total number of gallons of fuel consumed by Roehl and reported as the so-called "everywhere gallons" on Roehl's motor fuel tax returns.

In order to determine an actual highway-miles-per-gallon rate, the number of total miles operated by the Roehl fleet of vehicles was divided by the number of everywhere gallons. To determine the number of gallons consumed in each state, the number of miles traveled in each state was divided by the actual highway-miles-per-gallon rate.

14. During the period under review, Roehl purchased motor fuel in Wisconsin and in other states. When fuel was purchased by Roehl, some states, including Wisconsin, required Roehl to remit to the state of purchase an amount equal to the product of the number of gallons of fuel purchased multiplied by the fuel tax rate of the state of purchase.

Frequently, Roehl purchased motor fuel in bulk in Wisconsin. At the time Roehl withdrew motor fuel from its bulk storage and placed the fuel in its vehicles' supply tanks, Wisconsin required Roehl to remit to Wisconsin an amount equal to the product of the number of gallons of fuel withdrawn from bulk storage multiplied by the then Wisconsin tax rate and mail a monthly report to the Wisconsin Department of Revenue (income, excise, and sales tax division).

When filing its quarterly IFTA fuel tax reports, Roehl reported the amount of tax it determined to be due each IFTA state and the amount of funds remitted to each state at the time of fuel purchases and bulk usages. Where Roehl had remitted funds to a state, the amount of the remitted funds was credited against the reported fuel tax liability and Roehl paid any additional funds needed to meet the reported fuel tax liability. In cases where Roehl had remitted more funds to a state than Roehl's reported liability, at Roehl's election, Roehl received either a credit (carried over to a future period) or a refund of the excess funds from the state.

15. Respondent sent the notice identified on paragraph 23(i) below in June, 1990, along with the Second Quarter 1990 International Fuel Tax Agreement Fuel Tax Quarterly Report under date of July 19, 1990.

16. In July of 1992 and pursuant to an IFTA audit, auditors for respondent visited Roehl and reviewed its fuel tax filings for the period commencing April 1, 1988 through June 30, 1992 ("tax period"). In addition to determining some mileage reporting errors for one quarter in each of the years 1989, 1990, and 1992, the auditors determined that Roehl had allegedly erred by not reporting or paying state fuel taxes on motor fuel consumed in non-propelling uses. As a result of the audit, Roehl was assessed a total additional fuel tax including interest and penalties of \$194,246.85 ("the Assessment").
17. The total assessment for additional fuel tax, including interest, included assessments for taxes allegedly due respondent and the other member states of IFTA, to wit: Arkansas, Arizona, Colorado, Idaho, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming.

The following additional findings of fact are also made based on the exhibits in the record.

18. Pursuant to §Trans 152.07, Wis. Adm. Code, the IFTA and, during the applicable period, the Wisconsin-Minnesota-Iowa Fuel Tax Agreement Roehl is required to file periodic tax reports. A copy of a sample report from an IFTA Instruction Manual prepared by the Department (exhibit h) is attached to this decision as exhibit 1. The report requires Roehl to report the total distance its vehicles traveled in all jurisdictions and the total number of gallons consumed. The total miles traveled is divided by the total number of gallons to compute a fleet miles per gallon (MPG). The report then requires Roehl to list the number of miles traveled in each jurisdiction and the number of taxable miles traveled in each jurisdiction. Roehl is required to divide the number of taxable miles by its MPG to compute the number of gallons consumed in each jurisdiction. Finally, the gallons consumed is multiplied by the per gallon fuel tax for the applicable jurisdiction.
19. Roehl did not complete the tax reports it filed during the period from April 1, 1988 to June 30, 1992 in the manner described in paragraph eighteen.-- Roehl deducted the estimated number of gallons consumed by its vehicles while idling and used the remainder when computing its MPG. It used this figure for computing the tax owed to the various jurisdictions.
20. In the audit report (exhibit a), the Department referred to Roehl's recalculation of its fleet as the "claiming an idle time exemption." The Department responded to this exemption as follows: "Although [Roehl] indicates that the majority of idle time takes place off public roadways there are no records to indicate the location of the power unit during idle time periods. The idle time exemption is denied and all idle time gallons removed by [Roehl] from the MPG ... have been added back in to the MPG calculation for each quarter in the audit period. Subsequently, the MPG calculation has been reduced and [Roehl's] tax liability increased for the audit period."

### DISCUSSION

The excise tax for motor fuel and special fuel (in this discussion this tax will be referred to as a "fuel use tax") is collected from motor carriers in one of two ways. Pursuant to §78.40, Stats., the Wisconsin Department of Revenue imposes the fuel use tax at the time the fuel is delivered by a dealer into the supply tank of a motor vehicle. And, pursuant to §341.45(1g)(a), Stats., motor carriers are required to pay the fuel use tax to the Wisconsin Department of Transportation on motor fuel and special fuel which is purchased outside of Wisconsin but is consumed while operating on the highways of Wisconsin. Prior to the IFTA motor carriers which operated in several states were confronted with a burdensome task of reporting fuel consumption in the various states and filing for credits or refunds for fuel purchased in one jurisdiction and consumed while operating in another jurisdiction. The purpose of the IFTA is to reduce the paperwork and compliance burdens for fuel use tax reporting by interstate motor carriers.

Roehl, like other IFTA motor carriers, reports the fuel consumption of its qualified motor vehicles in each IFTA state to its base jurisdiction. This is done on a form which requires Roehl to list the total number of miles driven in each state. The total number of miles is then divided by the vehicle's miles per gallon to calculate the gallons of fuel consumed in each state. The amount of fuel consumed in each state is then multiplied by the applicable state's fuel tax.

Roehl has attempted to compute the amount of fuel its vehicles consume while idling. To accomplish this, it installed on-board computers on its vehicles which measure the amount of time the engine of the vehicle was running and the vehicle was not moving. To allow for time when the vehicle was stopped in traffic, for example at a red light or a railroad crossing, the computer does not start keeping track of the idle time until after eight minutes have passed. For purposes of this decision references to idling or idle-time will refer to the measured idling occurring after the passage of eight minutes.

Roehl also measured the amount of fuel consumed by its vehicles while idling. Based on the results of these measurements, Roehl recalculated the MPG achieved by its vehicles. The MPG for Roehl's vehicles was higher after deducting the gallons of fuel consumed while idling. Roehl used the higher MPG calculation in computing the number of gallons its vehicles consumed in Wisconsin, Minnesota, and Iowa during the time period the Wisconsin-Minnesota-Iowa Fuel Tax Agreement was in effect and in each IFTA jurisdiction after Wisconsin became a member of the IFTA. Using the higher MPG figure obviously significantly reduced the number of gallons on which Roehl paid fuel tax.

The issue to be decided in this matter as stated in the January 23, 1995 letter of the Administrative Law Judge is whether petitioner is required to report to Wisconsin fuel used for non-propulsion purposes. Implicit in this issue is a threshold question of to what extent is Wisconsin bound by the IFTA. A third issue is whether the Department's audit properly assessed petitioner for miles traveled in non-IFTA states. The Department has since agreed to abate the portion of the assessment for non-IFTA states

With respect to the question of to what extent Wisconsin is bound by the IFTA, the Department concedes that effective July 1, 1989, Wisconsin entered into the IFTA and agreed to be in compliance with the terms, conditions and requirements of the agreement. Section Trans 152.01(3), Wis. Adm. Code, expressly states that if any provisions of chapter Trans 152, Wis. Adm. Code, are inconsistent with the provisions of the IFTA, the provisions of the IFTA apply for motor carriers licensed under the IFTA. A threshold issue which needs to be determined is to what extent, if any, Wisconsin law is in conflict with the provisions of the IFTA? The provisions of the IFTA and Wisconsin law which are relevant to the instant case are those which define the taxable event for purposes of assessing fuel use tax. The IFTA, at paragraph III.A, defines the taxable event as "the consumption of motor fuel used in the propulsion of qualified motor vehicles." Section 341.45, Stats., defines the taxable event as the operation of a qualified motor vehicle on the highways of Wisconsin.

The phrase "to propel" suggests a moving vehicle and is probably synonymous with the term "driving." The term "operation" as defined at section 346.63(3)(b), Stats., is broader than driving. However, the activities the petitioner argues constitute non-propulsion fuel consumption do not fall within the definition of operating a motor vehicle on a highway of Wisconsin. For purposes of reviewing the audit which is the subject of this case, no significant difference exists between the activities Wisconsin statutes categorize as subject to the fuel use tax and those the petitioner argues the IFTA defines as taxable.

The petitioner is attempting to distinguish fuel consumed while a qualified motor vehicle is idling for such purposes as maintaining refrigeration, maintaining environmental controls in the cab while the driver is eating or sleeping, and while the vehicle is being loaded or unloaded. These activities mainly occur off-highway. The Department agrees that fuel consumed off-highway, including while idling, is not subject to the fuel use tax.

Section Trans 152.03(2), Wis. Adm. Code, expressly exempts from the fuel use tax fuel consumed while operating on private roads or driveways located in this state. Within the scope of operating on private roads and driveways is fuel consumed while idling on private roads and driveways. Additionally, at one time, at least the Motor Carrier Taxes & Permits Section of the Wisconsin Department of Transportation interpreted Wisconsin statutes and administrative rules as allowing an idle time exemption. The respondent's IFTA instruction manual (exhibit h, pages 5-6) allowed an exemption for off-highway idling time. However, this exemption was not recognized in the IFTA. The Department in a letter dated June, 1990 (exhibit i) instructed IFTA filers to disregard these instructions because off-loading and idle time "exemptions were never formally approved by IFTA jurisdictions and reference to off-loading exemptions has subsequently been removed from the IFTA."

Neither party disputes that fuel used for off-highway purposes, including idling, is not subject to the fuel use tax. Although in its brief, the petitioner frames the issue as whether under the IFTA a motor carrier is liable for motor fuel taxes on motor fuel consumed for purposes other than propulsion of motor vehicles on the public highways, it does not go so far as to say that fuel consumed while idling on a public highway, such as when the vehicle is stopped in traffic, at a red light or at a railroad crossing, is non-propulsion and; therefore,

not taxable. The examples cited by the petitioner are activities typically occurring off-highway.<sup>3</sup>

The next issue to be determined is whether the petitioner properly reported its fuel consumption. When it reported its fuel use for tax purposes, the petitioner deducted the gallons its vehicles consumed while they were idling more than eight minutes and recomputed its fleet MPG. Essentially the petitioner is alleging that any idling time longer than eight minutes is presumably off-highway fuel consumption and by deducting the gallons of fuel consumed during these idling periods, the petitioner avoided paying fuel use tax on these gallons. This method of reporting allegedly non-taxable fuel is contrary to §Trans 152.06, Wis. Adm. Code, the Wisconsin-Minnesota-Iowa Fuel Tax Agreement and the IFTA. According to the IFTA procedures manual and Wisconsin law, the petitioner can file for a refund or credit for any fuel consumed in off-highway uses that it can document. The remaining fuel is presumed to have been consumed during on-highway operation.

The petitioner contends that the procedure manual is inconsistent with the language of IFTA paragraph III.A which defines the taxable event "as the consumption of motor fuel used in the propulsion of qualified motor vehicles." If the provisions of the IFTA and the procedures manual are inconsistent, the petitioner argues the provisions of IFTA itself, not the accompanying procedures manual, should control. The petitioner argues that the definition of the taxable event in the IFTA is clear and unambiguous and; therefore, it is inappropriate to look beyond this definition to determine the intent of the drafters with respect to the taxable event. The language of IFTA paragraph III.A is not unambiguous. Even if the language of this paragraph were unambiguous, one must still look for the intent of the drafters to interpret the provision.

IFTA paragraph III.A must be read in the context of the entire agreement, including the procedures manual. The procedures manual requires motor carriers to report all fuel consumed. The total amount of fuel consumed is used to compute a MPG figure which in turn is used to calculate the amount of fuel consumed in each jurisdiction based upon the number of miles driven in the subject jurisdiction. Additionally, paragraph III.C of the IFTA establishes a presumption that "[a]ll motor fuel acquired that is normally subject to the consumption tax is taxable unless proof to the contrary is provided by the licensee." The IFTA requires motor carriers to pay fuel use tax on all fuel consumed unless the carrier can prove the fuel was used for a tax exempt purpose.

The distinction the drafters intended to make by the definition of the taxable event in paragraph III.A is not whether the fuel is consumed while the vehicle is moving, as opposed to stopped. The intended distinction is that the taxable event is the consumption of fuel, as opposed to the purchase of fuel or the placement of fuel into a supply tank. The intention of the drafters is to have a motor carrier's fuel use tax liability in a particular jurisdiction be a function of miles traveled in that jurisdiction and not based on where the carrier purchased fuel.

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<sup>3</sup>On page 24 of its initial brief, Petitioner states that "[t]he stipulated facts demonstrate that Roehl only recorded idle time which it reasonably believed occurred off-highway."

Under Wisconsin law fuel consumed during off-highway operation is not subject to the fuel use tax. A motor carrier is entitled to a refund for any fuel consumed in a verifiable, tax-exempt activity. Under the procedures set forth in the IFTA procedures manual and the Wisconsin IFTA instruction manual, the fuel use tax is avoided for fuel consumed during off-highway operation by tabulating the number of tax exempt miles and multiplying this number by the carrier's fleet MPG to calculate the number of gallons consumed off-highway. The carrier may then either not pay the fuel use tax on this number of gallons or seek a credit or refund for fuel use tax paid on this number of gallons.

This method of tax reporting is undoubtedly not satisfactory to the petitioner. The reason it is not satisfactory is that by definition idling time is time when the vehicle is not moving. Therefore, no off-highway miles are generated and there is no basis for a refund. To solve this problem Roehl attempted to compute the number of gallons its vehicles consumed while idling. The assumption underlying the petitioner's arguments with respect to the use of its computer technology for fuel use tax reporting is that any time one of its vehicles is idling for a period longer than eight consecutive minutes, the idling is occurring off-highway. Therefore, the fuel consumed during this idling time constitutes off-highway operation. The next issue to be determined is whether this assumption is valid.

This assumption may be reasonable. Additionally, there is no reason to doubt the petitioner's calculation of the amount of fuel its vehicles consumed while idling. However, this alone is not a sufficient basis to throw out a longstanding method of tax reporting. After an audit, the auditors rejected Roehl's computed MPG calculation and assessed Roehl for unpaid fuel taxes. The reason for rejecting this computation was that Roehl had no records to indicate the location of the power unit while idling.

Pursuant to §§Trans 152.06(4) and 152.08(3), Wis. Adm. Code, Roehl has the burden to prove that the gallons of fuel it deducted from its fuel reports and MPG calculation are not taxable.<sup>4</sup> Roehl has not satisfied this burden. In paragraph three of the stipulated findings of fact the parties agreed that one distinct category of idle time occurs off-highway. Roehl postulates that any time one of its vehicles idled in excess of eight minutes, that idling occurred off-highway. The Department did not stipulate to this fact. Nor can such a finding of fact be made based on the evidence in the record.

It is noteworthy that despite its concern that the fuel tax be assessed uniformly in the various states, the petitioner does not cite any jurisdiction which accepts its method of tax

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<sup>4</sup>The petitioner attempts to shift this burden by characterizing the fuel consumed while idling as non-taxable. The petitioner argues that it is not seeking a tax exemption for this fuel, rather it was never subject to tax in the first place. According to the petitioner, the burden should be on the Department to prove the fuel is subject to the fuel use tax. As discussed, both the IFTA, at paragraph III.C, and §Trans 152.06(4), Wis. Adm. Code, establish the presumption that all motor fuel and special fuel acquired is taxable unless evidence to the contrary is provided by the motor carrier. The petitioner's contention is clearly inconsistent with this presumption.

reporting.<sup>5</sup> Petitioner cites Arizona as a jurisdiction which "clearly taxes only fuel used in the propulsion of motor vehicles on a highway within that state." Section 28-1552B, Arizona Rev. Stat. Ann., provides that the Arizona fuel use tax "attaches at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of [Arizona]." However, §28-1556A, Arizona Rev. Stat. Ann., provides that "it shall be presumed, until the contrary is established by competent proof ..., that all use fuel received into any receptacle on a motor vehicle from which fuel is supplied to propel such vehicle is consumed in propelling the vehicle on the highways of [Arizona]." From a cursory review of Arizona statutes it appears that in Arizona, as in Wisconsin and under the IFTA, a motor carrier is required to pay tax on all fuel consumed unless the carrier can prove the fuel was consumed for a tax exempt purpose.

In summary, Wisconsin law exempts fuel consumed while a motor vehicle is operating off-highway from the fuel use tax including any fuel consumed while the vehicle is idling. However, Roehl must still report this fuel and then show it is tax exempt within the appropriate jurisdiction. Roehl has the burden of showing the fuel is tax exempt. Unless and until the Department accepts Roehl's assertion that any idling in excess of eight minutes presumptively constitutes off-highway operation, Roehl must use some other method of recordkeeping to support its claim for tax exemption for fuel consumed during off-highway idling time. The subject of this hearing is the validity of the Department's audit. Speculative discussion of recordkeeping methods which would be acceptable is beyond the scope of this hearing.

The petitioner raises two additional issues in its briefs. The first issue is that the Department has no authority to assess fuel use taxes for other jurisdictions from July 1, 1989 to the end of the audit period. The basis for this contention is that if Wisconsin is not bound by the IFTA, it can not use the IFTA as a basis to assess taxes for other IFTA jurisdictions. As discussed above, The Department concedes that Wisconsin has agreed to be in compliance with the IFTA, and, furthermore, the finding was made that Wisconsin law as applied by the Department is in compliance with the relevant provisions of the IFTA. Based on this finding the petitioner's argument disappears.

The other issue raised by the petitioner is that the Department does not have the authority to assess fuel use tax for Minnesota and Iowa during the period from April 1, 1988 to June 30, 1989. The basis for this contention is two-fold. Petitioner's first argument is the same as the argument raised with respect the authority of the Department to assess fuel use tax for IFTA states for the time period after Wisconsin entered into the IFTA. For the same reason that issue disappears this argument is also not persuasive.

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<sup>5</sup>It is acknowledged that the statement that Roehl does not cite any other states which accept its method of fuel tax reporting is tempered by the fact that Wisconsin is Roehl's base jurisdiction. For IFTA purposes Roehl only files tax reports with Wisconsin. However, Roehl also operates in non-IFTA jurisdictions. Roehl does not cite its experience regarding its method of fuel use tax calculation in any non-IFTA jurisdiction, nor is it able to cite the experience of any other motor carrier attempting to use similar methods of tax reporting in any IFTA jurisdiction other than Wisconsin.

The second argument is that the statute of limitations for assessment of fuel use taxes in Minnesota and Iowa had passed prior to the time the audit was conducted. As authority for this contention, the petitioner cites recordkeeping requirements for both Minnesota and Iowa. The Department alleges in its response brief that neither Minnesota or Iowa have statute of limitations for the assessment of fuel use taxes. The petitioner does not rebut this statement in its reply brief; therefore it will be assumed that no such statute of limitations exists in either state. The fact that neither state required motor carriers to keep records longer than three years is not a statute of limitations prohibiting the assessment of fuel use taxes for that period.

### CONCLUSIONS OF LAW

The Administrator Concludes:

1. Pursuant to §341.45(1g)(a), Stats., and §Trans 152.03(2)(b), Wis. Adm. Code, special fuel consumed off-highway, including while idling, is not subject to the fuel use tax.
2. Pursuant to §§Trans 152.06(4) and 152.08(3), Wis. Adm. Code, all special fuel is taxable unless proof to the contrary is provided.
3. Pursuant to §§341.43 and 341.45, Stats., and the Wisconsin-Minnesota-Iowa Fuel Tax Agreement, the Department has the authority to assess Roehl for unpaid Minnesota and Iowa fuel use tax for the period from April 1, 1988 to June 30, 1989.
4. Pursuant to §§341.43 and 341.45, Stats., and the International Fuel Tax Agreement, the Department has the authority to assess Roehl for unpaid fuel tax for IFTA jurisdictions for the period from July 1, 1989 to June 30, 1992.
5. Pursuant to §227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

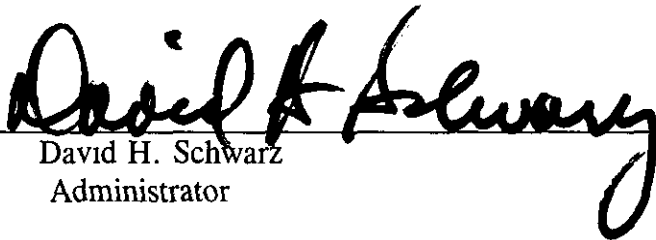
The Administrator Orders:

The results of the audit of Roehl Transport, Inc., performed by the Wisconsin Department of Transportation in July, 1992, are affirmed with the exception of those portions which assess the petitioner for fuel use taxes in non-IFTA jurisdictions. Pursuant to their stipulation, the parties will determine the proper measure of fuel tax.

Dated at Madison, Wisconsin on November 13, 1995.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By



David H. Schwarz  
Administrator

Wisconsin Department of Transportation, Division of Motor Vehicles  
MV2066-88 2341.43, Wis. Stats.

DATE DUE:

B. ☐ Amended ☐ No Operations ☐ Cancel Fuel License

Fuel Type	Total Miles Traveled All Jurisdictions	Total Gallons Used All Jurisdictions	Average Fleet MPG (2 decimal places)
D-Diesel	_____	_____	_____
G-Gasoline	_____	_____	_____
P-Propane	_____	_____	_____
GH-Gasohol	_____	_____	_____
NG-Natural Gas	_____	_____	_____

A. Fuel Account Number

Licensee Name & Mailing Address (Street, P.O. Box, City, State, Zip)

[illegible]

(Total columns on back side of this report)

(Total front side of this report below)

[illegible]

D. Penalty - (Late filers - see instructions)

3

**E. Previous Balance as of**

3

F. TOTAL TAX or CREDIT (U.S. Funds)

3

☐ Refund Requested

Make check payable to:	REGISTRATION FEE TRUST
Mail remittance and Report to:	WISCONSIN DEPT. OF TRANSPORTATION MOTOR CARRIER SERVICES SECTION P.O. BOX 7979 MADISON, WI 53707-7979

I certify with my signature below that the information and statements on this report are true and correct to the best of my knowledge.

**NOTE: RECORDS RETENTION** - Every licensee shall maintain records for a period of four years from the filing date of this report to substantiate information reported. Such records shall be made available for audit upon request.

Retain a copy of this report for your records

X

\_\_\_\_\_  
 (Licensee or Authorized Agent)

Date Signed

Reporting Agency Titled

Area Code - Telephone No.